Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1997

MITCHELL & NEELEY, INC.,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION, PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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77 pp

QUESTION PRESENTED

Does the Black Lung Benefits Act's regulatory scheme of granting exclusive authority to the Department of Labor (who is also a party-in-interest) to gather evidence and to identify and notify putative responsible operators violate its Fifth Amendment due process rights when the Department fails to notify it of potential responsibility for the payment of benefits"... as soon after the filing of the claim as the evidence obtained permits..."?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Mary Gamble, widow of James W. Gamble, ITT-Hartford, Inc. and United States Fidelity & Guaranty Company were parties before the Court of Appeals.

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Petitioner, Mitchell & Neeley, Inc., respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is non-published and is attached hereto and incorporated by reference as Appendix A. The Benefits Review Board decision and order, which is not published, can be found as Appendix B herein. The ALJ decision and order awarding benefits, dated August 22, 1994 is not published, but is attached hereto and incorporated by reference as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was filed and entered on September 22, 1997.

> The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

20 C.F.R. Part 725.412 provides:

> **20 C.F.R. Part 725.412 Identification and notification of responsible operator.**
>
> (a) At any time during the processing of a claim under this part, after sufficient evidence

has been made available to the deputy commissioner, the deputy commissioner may identify a coal miner operator which may be liable for the payment of the claim in accordance with the criteria contained in sub-art (f) of this part. Such identification *shall* be made as soon after the filing of the claim as the evidence obtained permits.

(b) After the deputy commissioner identifies an operator which may be liable for payment of benefits, the deputy commissioner *shall* notify such operator in writing.

(d) If, in any case, there is a dispute between two or more operators as to which may be liable for the payment of benefits to the claimant, all such operators shall be notified under this section and the issue of which operator is liable shall be determined by the appropriate adjudication officer.

(Emphasis supplied).

STATEMENT OF THE CASE

The fundamental question in this case is whether the responsibility for paying a black lung claimant's entitlement to benefits should be shifted from a responsible coal mine operator to the Department of Labor's Black Lung Disability Trust Fund because of its failure to timely notify the operator of a pending claim in violation of the operator's due process rights guaranteed by the Fifth Amendment to the United States Constitution. To fully appreciate the significance of the issue presented by this case, it is essential to consider its lengthy procedural background.

A. Background of Notifying the Responsible Operator.

The process leading to the filing of the coal mine operator's petition begins on March 19, 1974 when the miner filed his claim for benefits. In his History of Coal Mine Employment, filed contemporaneously with the claim for benefits, the miner identified Cowin & Company, Inc. as his last coal mine employer. The miner also identified Mitchell & Neeley as a putative operator based on his 20 year history of coal mine work with them. Responsive to a Department of Labor form questionnaire asking "whether Cowin & Company's coal mine is still operating, the miner responded "we are opening a mine, it is not yet in operation." The miner further reported:

> Cowin & Company is engaged in opening an underground mine for U.S. Steel. When there is nothing to be hauled off, I work underground in the mine. At present, we are ready to start laying track, as we are down to the coal and have finished putting the steel in. All of my time from now on will be spent inside the mine.

In gathering evidentiary material in conformity with 20 C.F.R. §725.401; 725.404-725-407, the Director, OWCP completed a report of contact, dated March 20, 1974 with Mitchell & Neeley. Thus, the Director was placed on notice as soon as the miner's claim was filed that Mitchell & Neeley was a putative responsible operator.

From 1974 to 1979, the Director, placed no operator on notice of the pending claim. Ostensibly, it continued to gather the medical evidence necessary to administratively determine whether the claim should proceed against a responsible operator. Cowin & Company was initially identified as the responsible operator and an Operator's Notification form was filed against them on April 17, 1979. For reasons known only to the Director,

Mitchell & Neeley was not placed on notice along with Cowin & Company at that time. In a continuum of ALJ hearings and orders and BRM decisions, Cowin & Company were eventually dismissed as the responsible operator on the basis that the miner had not engaged in "coal mine employment" for a period of one year as required by federal regulation.

In the meantime, the miner/claimant died on September 28, 1982. In order to gather evidence to support her husband's claim for benefits, the widow obtained an autopsy of her husband's lungs and heart. Eventually, this evidence was relied upon by the ALJ in supporting his decision awarding benefits to the claimant. The ALJ also rejected Mitchell and Neeley's rebuttal evidence concerning the autopsy evidence on the basis that it did not analyze the tissue samples themselves. The reason Mitchell and Neeley didn't and couldn't review the samples is because it was not a party to the proceedings when the miner died. The Director had not yet placed Mitchell & Neeley on notice of its putative responsibility.

The widow filed a claim for survivor's benefits on May 2, 1983. At this point, both Cowen & Company and Mitchell & Neeley were sent Operator Notification forms. The Director convened and conducted a hearing on July 20, 1983 and on November 7, 1983, a Memorandum of Conference was published awarding benefits to the miner. Mitchell & Neeley was not notified of the conference and did not participate in it. Eventually, the Director's Order was voided because the original miner's claim was pending on appeal to the BRB.

Mitchell & Neeley was not permitted to participate in any administrative proceedings to consider the miner's entitlement to benefits until a conference was reconvened and conducted by the Director on March 21, 1988, 14 years and 2 days after the claim was filed. However, due to travel constraints, even then no "hearing" was con-

ducted. Eventually, the BRB remanded Cowen & Company's appeal to an ALJ, who subsequently dismissed it as a responsible operator. Once again, Mitchell & Neeley was not notified of and did not participate in these ancillary proceedings, which would eventually impact it since Mitchell & Neeley had no opportunity to confront Cowin & Company and to challenge its dismissal as the responsible operator.

B. The Proceedings Below.

Mitchell & Neeley's first opportunity to be heard and to present evidence occurred on November 7, 1988 in a hearing convened and conducted by ALJ A. A. Simpson. Eventually, his decision, published on April 5, 1989 awarded benefits to the miner, dismissed Mitchell & Neeley as the responsible operator and ordered the Black Lung Disability Trust Fund to pay benefits to the miner on the basis of *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). Since Mitchell & Neeley believed this decision is procedurally and substantively proper in all respects, a copy is identified herein and incorporated as Appendix D.

Since the Black Lung Trust Fund was ordered to pay benefits, the Director, OWCP, appealed the ALJ's decision and order. The Director argued that the operator, rather than the trust fund, was responsible for payment of miner's benefits. In a non-published decision, dated March 29, 1993, the BRB agreed, concluding that *Crabtree* was inapplicable and thus, the operator was responsible for any payment of benefits. However, since the Director had not controverted the merits of the claim, the case was remanded to the ALJ for a *de novo* consideration of the miner's entitlement to benefits.

On August 22, 1994, ALJ James W. Kerr, Jr., issued a decision and order awarding benefits on the miner's

claim.[1] The ALJ decision was then appealed by the operator/petitioner. Thereafter, in a non-published decision issued March 27, 1996, the BRB affirmed the miner's award of benefits. An appeal to the United States Court of Appeals for the Eleventh Circuit followed.

REASONS FOR GRANTING THE WRIT

I.

The petition should be granted because the opinion below conflicts with the Court's prior rulings defining the fundamental due process right of a litigant to be heard at a meaningful time in a meaningful way.

Mitchell & Neeley Inc.'s petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior rulings requiring an administrative agency to permit a litigant to participate at a meaningful time and in a meaningful way in its proceedings. In this case, the Department of Labor, by and through its Director, OWCP failed to identify and notify Mitchell & Neeley of its putative responsibility for the payment of black lung benefits until after the miner had died. Despite evidence that Mitchell & Neeley was, at the very least, a putative operator, the Director failed in its administrative responsibility to notify the operator until their ability to gather meaningful evidence was irreparably harmed.

As this Court has recognized, the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 96 S.Ct. 893, 902 (1976) *citing, Armstrong v. Manzo,* 85 S.Ct. 1187, 1191 (1965). Due process is a flex-

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[1]The case was remanded to ALJ A. A. Simpson, Jr. However, upon his retirement, the claim was reassigned to ALJ Kerr.

ible concept which calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer,* 92 S.Ct. 2593, 2600 (1972). The resolution of the issue whether the administrative procedures provided by the Director are constitutionally sufficient requires analysis of the governmental and private interests that are affected. *Arnett v. Kennedy,* 94 S.Ct. 1633, 1650-1 (1974).

In this case, the government has a vested interest in protecting the Black Lung Disability Trust Fund against paying the benefits to the miner. The trust fund is responsible for paying black lung benefits in certain circumstances, including when no operator is found liable for the benefits. 26 U.S.C. § 950(d)(1)(B). The government also has the responsibility to gather evidence and to notify all putative operators in a timely manner. To the extent that the notice to the operator can be delayed until its obligation to gather evidence has been completed, the Director gains an adversarial advantage over the operator, which necessarily benefits the trust fund. Thus, the regulatory scheme has built in an inherent conflict of interests which gives the Director the opportunity to prejudice the due process rights of the operator simply by delaying notice to it.

Conversely, the operator's private interest were adversely affected because it was not a party to the case when the all important lung and hear autopsy was performed at the widow's request. At pages 3-4, the ALJ relied on the autopsy findings to support the invocation of the interim presumptions entitling the miner to benefits. *See* App. C. In affirming the ALJ Decision and Order, the BRB specifically observed that the operator's medical doctor, who was proffered in rebuttal to the miner's *prima facie* showing, did not review any autopsy or biopsy slides. His testimony was discredited in part on this basis and was rejected by the BRB as irrelevant. *See* App. B. @ page 4. However, the reason the doctor was unable to

personally review the slides is because they were taken well before the operator was in the case. Thus, it never had the opportunity to cross examine what would become a critical piece of evidence.

Since the inception of the Black Lung Benefit's Act, this Court has had only a handful of opportunities to consider the far reaching implications of the authority granted to the Department of Labor. In the few decisions decided by the Court, the question of the Secretary's interim regulations has been the pivotal issue. See, e.g., *Pauley v. Bethengeries Mines, Inc.*, 111 S.Ct. 2524 (1991); *Pittston Coal Group v. Sebben*, 109 S.Ct. 414 (1988); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 108 S.Ct. 427 (1987). The Court also had the recent opportunity to consider the "True Doubt Rule" applied by ALJs in adjudicating claims under the Black Lung Benefits Act. *See, Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994). However, to date, the Petitioner's research reveals no case in which the Court has been asked to consider the Department of Labor's obligations to satisfy an Operator's due process rights as it attempts to juggle its competing interests of (1) gathering evidence relevant to the miner's claim, (2) satisfying its regulatory obligation to identify and notify all potential operators ". . . as soon after the filing of the claim as the evidence obtained permits. . ." and (3) protecting its Black Lung Disability Trust Fund against responsibility for the payment of benefits to eligible claimants.

The question identified for review in this Petition is whether in attempting to juggle its competing and conflicting obligations, the Department of Labor denied the coal mine operator its procedural due process guarantees of the Fifth Amendment by failing to identify it as a responsible operator ". . . as soon after the filing of the claim as the evidence obtained permits. . . ." in violation of 20 C.F.R. §725.412 (a). The Writ should be granted

because in attempting to protect its Black Lung Disability Trust Fund against responsibility for the payment of benefits in this case, the Department of Labor has effectively denied to the Petitioner its due process rights guaranteed by the Fifth Amendment by failing to notify it of the claim in sufficient time to meaningfully participate in gathering and cross examining relevant evidence.

Under 20 CFR §725.412, entitled Identification and Notification of Responsible Operator, the Department of Labor has the exclusive authority and responsibility to identify and notify all putative responsible operators. The operative language requires the Director to identify a coal mine operator which may be liable for the payment of the claim as soon after the filing of claim as the evidence obtained permits. Then the Director shall notify such operator in writing. Furthermore, if in any case there is a dispute between two or more operators as to which may be liable for the payment of benefits to the claimant, all such operators shall be notified and the issue of which operator is liable shall be administratively determined.

In addition to identifying and notifying putative responsible operators, the Department of Labor has the additional obligation to develop claims including gathering the claimant's employment history and medical records. *See generally* 20 C.F.R. §§725.401, 725.404 through §725.407. Under the regulatory scheme, the operator shall then be given an opportunity to rebut the evidence suggesting entitlement to benefits. *See,* 20 C.F.R. §725.414. A proposed decision and order is then issued by the Deputy Commissioner. *See,* §725.418. It is the Deputy Commissioner's obligation to notify all parties of hearings conducted to determine a claimant's entitlement to benefits throughout the proceedings. *See,* 20 C.F.R §725.453.

If an initial determination is made in favor of a claimant, the Black Lung Disability Trust Fund is obligated to commence benefits within 30 days, if the operator fails or refuses to pay the claim. The Department of Labor then has the right to seek a refund from the operator. Thus, the regulatory scheme is designed to encourage the Department of Labor to gather evidence and make an initial determination prior to identifying and notifying a putative responsible operator. However, since the Department of Labor is a potential party-in-interest because of its obligations *vis-a-vis* the Black Lung Disability Trust Fund, it has the opportunity, by delaying notification to a putative operator, to procedurally and substantively prevent an operator from a meaningful participation in the claims process. This is both fundamentally unfair and violative of the Fifth Amendment guarantees to the responsible operator.

II.

The Petition should be granted because the United States Court of Appeals for the Fourth Circuit has entered a decision in conflict with a decision of the United States Court of Appeals for the Sixth Circuit concerning the Department of Labor's due process obligations to timely notify a putative operator of its potential responsibility for paying benefits under the Black Lung Benefits Act.

The regulations controlling the implementation of the Black Lung Benefits Act require the Director to identify, notify and develop evidence regarding potential responsible operators. *See,* 20 C.F.R. §§725.410(B), 725.412. Since the regulations give the Director the authority to develop evidence in identifying a responsible operator, it necessarily has burden of persuasion and proof. *Director,*

OWCP v. Trace Fork Coal Co., 67 F.3d 503, 507 (4th Cir. 1995).

If two or more operators may be liable for the payment of benefits, and if there is a dispute between competing operators, the Director shall notify all putative operators in order to give them a fair opportunity to shift responsibility from one operator to another. *See,* 20 C.F.R. §725.412(d). In order to avoid "piecemeal litigation", the BRB has imposed the further obligation on the Director that it resolve the operator issue in a preliminary proceeding. *See, Crabtree v. Bethlehem Steel Corp.*, 7 Black Lung Reporter 1-354 (1984).

Clearly, Mitchell & Neeley was not notified in a preliminary proceeding in this case. As a consequence, it had neither the opportunity to contest the dismissal of Cowin & Co. as the responsible operator nor the ability to rebut the biopsy and autopsy results which would later be used against it in determining responsibility for paying benefits under the Act. The Director has proffered no explanation excusing, mitigating, or justifying its failure to provide timely notice to Mitchell & Neeley. Instead, it has argued that timely notice is not mandated by the Act. Petitioner argues that due process does mandate timely notice and that the Director's cavalier disregard of it in this case has resulted in actual prejudice to Mitchell & Neeley's property rights under the Fifth Amendment.

In *Crabtree,* as in this case, the Director named one operator to defend the claim. Following the dismissal of the first operator, the Director attempted to name a second putative operator. The B.R.B., however, refused the Director's attempt, stating in pertinent part:

> The Department of Labor is not entitled to a second opportunity to identify another putative responsible operator.

> The Department is authorized by law to identify the putative responsible operator who may be liable for payment of benefits, in the course of determining whether a miner is entitled to benefits. 20 C.F.R. §§724.410, 725.412. The regulations contain no express provision requiring the Department to identify all putative responsible operators, and resolve any dispute as to which one is properly responsible for benefits, in one proceeding. We hold, however, that due process, as well as the efficient administration of the Act, compels the result.
>
> Remand for reconsideration of the operator issue would be tantamount to relitigation the claim. This piecemeal approach encourages two undesirable results. First, a claimant who has established entitlement in the first round of proceedings may low his award in a later round against another operator. A first finding of entitlement, even though fully developed and litigated, can be defeated in subsequent proceedings by a different operator, and not always on the merits. Second, piecemeal litigation obviously is not compatible with the administration of the Act and expeditious processing of claims.
>
> In view of the aforementioned considerations, the Department must resolve the operator issue in preliminary proceeding, see Crabtree, and/or proceed against all putative responsible operators at every stage of the claims adjudication.

The Fourth and Sixth Circuits have both had the opportunity to consider *Crabtree* and its application *vis a vis* operator notification. In the cases of *Director, OWCP v. Trace Fork Coal Co.*, 67 F.3d 503 (4th Cir. 1995) and *Director, OWCP v. Oglebay Norton Co.*, 877 F.2d 1300 (6th Cir. 1989), the lower courts reached conflicting results in their attempts to apply the due process concerns ex-

pressed by the BRB in *Crabtree.* Petitioner believes that the dissenting opinion in *Oglebay* correctly states the logic which should be adopted by the Court and we urge it to grant the writ to resolve the conflict between the circuits. *See, Director, OWCP v. Oglebay Norton Co.,* 877 F.2d @ 1306 (Wellford, C.J., *dissenting*).

CONCLUSION

It is fundamentally unfair to vest the DOL with the exclusive authority to adversely influence a benefits decision by delaying operator notification beyond the point of allowing a meaningful participation. As a party-in-interest, the DOL should be required to identify and notify all putative operators during preliminary proceedings. In this case the DOL failed to do so to the due process detriment of the petitioners. The DOL has proffered no explanation excusing the prejudicial delay. This case presents the opportunity for the Court to direct the DOL in its future claims processing.

Accordingly, the petitioners requests the Court to grant the writ by requiring the lower court to shift the responsibility for paying benefits from the operator to the trust fund.

APPENDIX

APPENDIX

A. September 22, 1997, Order on Petition for Review of an Order of the Department of Labor Benefits Review Board.

B. March 27, 1996 Benefits Review Board Decision and Order, Appeal of the Decision and Order - Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge

C. August 22, 1994, Administrative Law Judge Decision and Order Awarding Benefits

D. April 10, 1989, Administrative Law Judge Decision and Order - Awarding Benefits

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-6501

BRB No. 94-4027 BLA
OWCP No. 419-16-2738

MITCHELL & NEELEY, INC.,
Petitioner,

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Party-in-Interest,

versus

MARY GAMBLE (Widow of James W. Gamble),
Respondent.

Petition for Review of an Order of the
Department of Labor Benefits Review Board

(September 22, 1997)

Before BIRCH, Circuit Judge, FAY, Senior Circuit Judge, and COHILL*, Senior District Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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*Honorable Maurice B. Cohill, Jr., Senior U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

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[1]11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

BRB No. 94-4027 BLA
OWCP No. 419-16-2738

MARY GAMBLE	)	
(Widow of JAMES W. GAMBLE)	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MITCHELL & NEELEY,	)	DATE ISSUED:
INCORPORATED	)	March 27, 1996
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	

DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Graham L. Sisson, Jr. (Nakamura & Quinn), Birmingham, Alabama, for claimant.

J. Bentley Owens, III (Starnes & Atchison), Birmingham, Alabama, for employer.

Jeffrey S. Goldberg (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Liti-

gation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (88-BLA-2308) of Administrative Law Judge James W. Kerr, Jr. on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The miner filed a claim on March 19, 1974. Director's Exhibit 1A. On September 28, 1982, the miner died, Director's Exhibit 4B, and, on May 2, 1983, his widow filed a survivor's claim. Director's Exhibit 1B. In an Order of Remand issued February 1, 1983, Administrative Law Judge Edward J. Murty, Jr. dismissed Cowin & Company, Inc. (Cowin) as responsible operator and remanded the case to the district director for the designation of a responsible operator. Director's Exhibit 44A. The Director, Office of Workers' Compensation Programs (Director), appealed and the Board held that Judge Murty erred in finding that the miner had not been exposed to coal mine dust while employed for Cowin. The Board, therefore, remanded the case to the Office of Administrative Law Judges for reconsideration of the issue. *Gamble v. Cowin and Company, Inc.*, BRB No. 83-571 BLA (Oct. 29, 1986) (unpublished).

On remand, Judge Murty, in a Decision and Order issued on January 19, 1988, found that Cowin was not the responsible operator inasmuch as the miner had only engaged in four months of qualifying coal mine employment with Cowin. Judge Murty thus remanded the case to the district director for further consideration of the

responsible operator issue.[1] Director's Exhibit 60A. The district director subsequently dismissed Cowin as responsible operator and named Mitchell & Neeley, Inc. (employer) as the putative responsible operator in both the miner's and survivor's claims. The district director then issued a "De Novo Reconsideration," wherein claimant was found entitled to payment of benefits by employer.

In a Decision and Order - Awarding Benefits issued on April 5, 1989, Administrative Law Judge A. A. Simpson, Jr. credited the miner with nineteen years and four months of coal mine employment. Judge Simpson found that employer was properly designated as a putative responsible operator with respect to the survivor's claim. Judge Simpson also found that, based on the Board's decision in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984), employer must be dismissed as the responsible operator liable for the payment of any benefits on the miner's claim. Judge Simpson awarded benefits on the miner's claim on the basis that the Director had not contested entitlement. Finding the evidence insufficient to establish the existence of pneumoconiosis or death due to pneumoconiosis, Judge Simpson found that claimant failed to establish entitlement to survivor's benefits under 20 C.F.R. Part 718. Judge Simpson, however, found that claimant was entitled to derivative survivor's benefits.

The Director appealed, and the Board, in a Decision and Order issued on March 29, 1993, reversed Judge Simpson's finding that employer was not the responsible operator in the miner's claim. The Board also affirmed Judge Simpson's denial of benefits on the survivor's

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[1]The party responsible for the initial processing of a claim for benefits, formerly known as the deputy commissioner, is now known as the district director. See 20 C.F.R. §725-101(a)(11); 55 Fed. Reg. 28606 (July 12, 1990). This change is for procedural purposes only and has no substantive effect.

claim under Part 718, as unchallenged on appeal. Accordingly, the case was remanded to the Office of Administrative Law Judges for consideration of the living miner's claim on the merits. *Gamble v. Mitchell & Neeley, Inc.*, BRB No. 89-1654 BLA (Mar. 29, 1993) (unpublished). Employer appealed, and the United States Court of Appeals dismissed the petition for review for lack of jurisdiction. *Mitchell & Neeley v. Gamble,* No. 93-6442 (11th Cir. Sept. 30, 1993) (unpublished).

On remand, Administrative Law Judge James W. Kerr, Jr. (the administrative law judge), in a Decision and Order - Awarding Benefits issued on August 22, 1994, found that employer was the responsible operator in the miner's claim. The administrative law judge also determined that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(2), and that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b).[2] Accordingly, the administrative law judge awarded benefits in the miner's

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[2]We affirm the administrative law judge's finding that the pulmonary function study evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(2), inasmuch as this finding is not challenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983). We also affirm the administrative law judge's findings that rebuttal was not established under Section 727.203(b)(1) and (b)(2), since these findings are not contested on appeal. *See id.*

Claimant, in her response brief, arguesthat the administrative law judge erred by not finding the evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(3)-(4). Inasmuch as we affirm the administrative law judge's findings that invocation is established under Section 727.203(a)(1) and (a)(2), we decline to address these arguments. *See* Gillen v. Peabody Coal Co., 16 BLR 1-22, 1-25 n.2 (1991); Cox v. Director, OWCP, 5 BLR 1-525 (1982).

claim. The administrative law judge also found that claimant was entitled to derivative survivor's benefits.

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator, and argues generally that the administrative law judge also erred on the merits. The Director and claimant have filed response briefs arguing that the Board properly reinstated employer as the responsible operator. In addition, claimant argues that the administrative law judge properly awarded benefits to the miner and derivative benefits to claimant.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer argues generally that the Board's decision in *Crabtree* is applicable to the instant case. The Board, in its Decision and Order issued on March 29, 1993, held that its decision in *Crabtree* was not applicable. The Board held that the concerns delineated in *Crabtree* concerning piecemeal litigation were not present, since employer was named as a responsible operator prior to any formal hearing on the merits. Additionally, the Board held that employer received its procedural due process rights to present evidence, develop its own case and confront and cross-examine the evidence presented on behalf of the miner's claim. The Board concluded that employer was not unduly prejudiced by its designation as responsible operator in the miner's claim. Because employer has not argued that the Board's holding was clearly erroneous or contradictory to a subsequent decision by a controlling authority, the Board's holding is the law of the case and

will not be altered. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990), *vacated on other grounds sub nom. Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

In challenging the administrative law judge's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1), employer generally argues that the administrative law judge erred in discounting Dr. Goldstein's opinion. Section 727.203(a)(1) provides that the interim presumption may be invoked by x-ray, autopsy or biopsy evidence which establishes the existence of pneumoconiosis. *See* 20 C.F.R. §727-203(a)(1). In his deposition finding that the miner did not have pneumoconiosis, Dr. Goldstein indicated that he merely reviewed, in addition to reviewing other evidence, the autopsy or biopsy reports and was not afforded the opportunity to review any autopsy or biopsy slides. Employer's Exhibit 4. Thus, the administrative law judge properly considered Dr. Goldstein's opinion to not constitute relevant evidence at subsection (a)(1). *See generally* 30 U.S.C. §923(b); 20 C.F.R. §727.203(a)(1).

Employer also challenges generally the administrative law judge's reliance upon the autopsy report of Drs. Walker and Mowry and contends that a mere statement of anthracosis does not, in itself, establish pneumoconiosis. Contrary to employer's suggestion, anthracosis is encompassed within the legal definition of pneumoconiosis at 20 C.F.R. §727.202. *See Bueno v. Director, OWCP*, 7 BLR 1-337 (1984); *Fetterman v. Director, OWCP*, 7 BLR 1-688, 1-690 n.2 (1985) (O'Shea, J., dissenting); *see also Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993). Consequently, the administrative law judge properly found that the autopsy report of Drs. Walker and Mowry, which noted the presence of

moderate anthracosis, supported a finding of pneumoconiosis. *Id.*

Inasmuch as employer raises no further assertions of error on the part of the administrative law judge in finding the evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1), that finding is affirmed. Consequently, we affirm the administrative law judge's finding that rebuttal of the interim presumption under Section 727.203(b)(4) is unavailable. *See Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994) (Brown, J., concurring and dissenting; McGranery, J., concurring and dissenting); *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

With regard to the administrative law judge's finding that the evidence was insufficient to establish rebuttal pursuant to Section 727.203(b)(3), employer's general contention that the administrative law judge rejected Dr. Goldstein's opinion, that the miner's chronic obstructive pulmonary disease was due to smoking, in favor of another doctor's opinion without sufficient explanation lacks merit.[3] The administrative law judge provided several grounds for his finding that rebuttal was not established pursuant to subsection (b)(3). The administrative law judge permissibly credited Dr. Russakoff's opinion that the miner had significant pulmonary dysfunction due to pneumoconiosis on the basis that Dr. Russakoff

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[3]The United States Court of Appeals for the Eleventh Circuit, wherein jurisdiction for the instant case arises, has held that in order to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), the party opposing entitlement must establish that pneumoconiosis is not a contributing cause of total disability. Alabama By-Products Corp. v. Killingsworth, 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984).

had the benefit of conducting the most recent pulmonary evaluation of the miner. *See* Director's Exhibits 12A-13A, 18A, 20A, 28A, 8B; Employer's Exhibit 4; *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). The administrative law judge also acted within his discretion as fact-finder in discounting Dr. Goldstein's opinion as it was based, at least in part, upon his "questionable" finding that the miner did not have pneumoconiosis, *see* Director's Exhibits 12A, 13A, 18A, 20A, Employer's Exhibit 4; *Trujillo v. Raiser Steel Corp.,* 8 BLR 1-472 (1986). Inasmuch as the administrative law judge provided proper reasons for crediting Dr. Russakoff's opinion over Dr. Goldstein's opinion, any errors that the administrative law judge may have committed with regard to the other grounds for according more weight to Dr. Russakoff's opinion are harmless. *Kozele v. Rochester and Pittsburgh Coal Co.,* 6 BLR 1-378 (1983). Consequently, we affirm the administrative law judge's finding that the evidence was insufficient to establish rebuttal at Section 727.203(b)(3).[4] We, therefore, affirm the administrative law judge's award of benefits in the miner's claim. We also affirm the administra-

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[4]On appeal, employer states, in a footnote:

> Rather than restating its arguments in rebuttal to consideration of pneumoconiosis under §727, the employer restates and adopts its arguments contained in Part Three of its post-hearing brief on or about 5 January 1989, and contained in the record on appeal [sic]. Employer's Brief at 6 n.2.

Inasmuch as employer's post-hearing brief was written before the issuance of the administrative law judge's Decision and Order and alleges no specific error on the part of the administrative law judge, we decline to consider the general contentions in the post-hearing brief to the administrative law judge dated January 5, 1989. *See* 20 C.F.R. §802.211; Sarf v. Director, OWCP, 10 BLR 1-119 (1987); Fish v. Director, OWCP, 6 BLR 1-107 (1983).

tive law judge's award of derivative survivors' benefits. 30 U.S.C. §932(1); 20 C.F.R. §725-212(a)(3)(ii); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *see also* 20 C.F.R. §§725.218, 725.222.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

/s/ Bett Jean Hall

BETT JEAN HALL, Chief
Administrative Appeals Judge

/s/ Roy P. Smith

ROY P. SMITH
Administrative Appeals Judge

/s/ Nancy S. Dolder

NANCY S. DOLDER
Administrative Appeals Judge

CERTIFICATE OF SERVICE

94 4027-BLA Mary Gamble (Widow of James W. Gamble) v. Mitchell & Neely, Inc., Director, Office of Workers' Compensation Programs (Case No. 88-BLA-2308) (OWCP No. 419-16-2738)

I certify that the parties below were served this day.

March 27, 1996
(DATE)

/s/ Thomas O. Shepherd, Jr.
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Clerk of the Board

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Judge James W. Kerr, Jr.
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IN THE MATTER OF	)	Date Issued:
	)	AUG 22, 1994
MARY GAMBLE, WIDOW OF	)	Case No.
JAMES W. GAMBLE,	)	88-BLA-2308
Claimant	)	OWCP No.
	)	419-16-2738
v.	)	
	)	
MITCHELL & NEELEY, INC.,	)	
Employer	)	
	)	
and	)	
	)	
DIRECTOR, OFFICE OF WORKERS COMPENSATION PROGRAMS	)	
	)	
Party-in-Interest	)	

William Z. Cullen, Esquire
For the Claimant

J. Bentley Owens, III, Esquire
For the Employer

Before: JAMES W. KERR, JR.[1]
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This claim arises under the provisions of the Black Lung Benefits Act, 30 U.S.C. §901, *et seq.*, and pertinent regulations promulgated thereunder.

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[1]This case had been remanded to Administrative Law Judge A. A. Simpson, Jr. However, upon his retirement, this matter was re-assigned for my consideration.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. Benefits are also payable to the survivors of persons whose death was caused by pneumoconiosis, and, for claims filed prior to January 1, 1982, to the survivors of persons who were totally disabled from pneumoconiosis at the time of their death. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

Statement of the Case

On April 5, 1989, Administrative Law Judge A. A. Simpson, Jr. issued a Decision and Order awarding benefits in the above captioned case.[2] In summary, Judge Simpson made the following rulings: 1. The putative responsible operator, Mitchell & Neeley, Inc., cannot be held liable regarding the miner's claim because it purportedly had been denied an opportunity to challenge the claim; 2. Since liability for benefits regarding the miner's claim falls on the Trust Fund, and the Director did not contest entitlement, benefits must be awarded on the miner's claim; 3. The widow's separate application for benefits under the Act was denied; and 4. Despite the denial of the widow's claim on its own merits, the widow is automatically entitled to continued benefits, because the miner was awarded benefits on a claim filed before January 1, 1982.

On March 29, 1993, the Benefits Review Board issued a Decision and Order (BRB No. 89-1654 BLA) in which it affirmed Judge Simpson's denial of the widow's claim, as

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[2]The tortuous procedural history of this case is outlined in Judge Simpson's decision, the Benefits Review Board's Decision and Order, dated March 23, 1993, and in Claimant's letter brief, dated June 7, 1994.

being unchallenged on appeal. However, the Board found that the Employer, Mitchell & Neeley, Inc., had ample opportunity and, in fact, defended both the miner's and widow's claims. Therefore, the Board reversed the administrative law judge's finding that the Employer is not the responsible operator in the miner's claim. Accordingly, the Board concluded:

> . . . in reversing the administrative law judge's responsible operator finding on the miner's claim, we must remand the case for consideration of the miner's claim on the merits, particularly in light of the fact that employer controverted all relevant issues . . . As the miner's claim was originally filed on March 19, 1974, the administrative law judge must consider whether entitlement can be established pursuant to 20 C.F.R. Part 727. Additionally, if, on remand the administrative law judge finds no entitlement on the miner's claim under Part 727, claimant is entitled to have that claim considered pursuant to 20 C.F.R. Part 718 . . . (citation omitted) . . . Lastly, we note that if entitlement is established on the miner's claim under either Part 727 or Part 718, claimant is derivatively entitled to benefits. *See* 20 C.F.R. §725.212(a)(3)(ii); see generally *Deloe v. Director,* OWCP, 16 BLR 1-9 (1991).

(BRB Decision and Order, dated March 29, 1993, p. 5).

Findings of Fact and Conclusions of Law

Having reviewed the entire record, the Court adopts Judge Simpson's finding of more than 19 years of coal mine employment (ALJ Simpson decision, pp 5-6). In addition, the Court incorporates by reference the detailed summary of the medical evidence as listed in Judge Simpson's decision (ALJ Simpson decision, pp. 8-15).

However, Judge Simpson never made a ruling on the merits of the miner's claim, nor did he ever consider the case under the Part 727 regulations. Accordingly, the Court is not bound by his prior findings or analysis of the medical evidence.

Analysis of Medical Evidence

X-rays, Biopsy, and Autopsy

The record contains numerous x-ray readings of films dated September 27, 1976, May 22, 1979, and June 6, 1980, respectively. The preponderance of the x-ray evidence in 1976 and 1979 is negative for pneumoconiosis. However, pneumoconiosis is a progressive and irreversible disease. Accordingly, greater weight is generally accorded the more medical evidence. With respect to the June 6, 1980 film, three B-readers, Drs. Russakoff, Ballard, and Walker, interpreted the x-ray as positive for pneumoconiosis, while only two B-readers, Drs. Hayes and Goldstein, found it to be negative for pneumoconiosis. Moreover, two dual-qualified B-readers and Board-certified radiologists, Drs. Ballard and Walker, found pneumoconiosis on the 1980 x-ray, while only one similarly qualified physician, Dr. Hayes, found no pneumoconiosis on the film. Taken as a whole, the Court finds that the x-ray evidence establishes pneumoconiosis.

The record also contains the results of a biopsy dated June 23, 1981 which apparently was taken in conjunction with the miner's lung cancer. Among the findings, however, were repeated findings of "anthracotic pigmentation" and one of the diagnoses listed "lung, fibrosis with anthracotic pigmentation and multiple small foci of adenocarcinoma." Although it is questionable whether such a finding, in and of itself, meets the regulatory definition of pneumoconiosis, it certainly does not preclude such a finding.

The autopsy report contains some similarly ambiguous findings. Although pneumoconiosis was not listed among the various anatomical diagnoses, the gross findings included "anthracosis." Adding to the ambiguity is the fact that the prosector concluded that there is no nodular fibrosis to suggest silicosis, and that although he found "at least moderate" anthracosis, it was "not greater than that seen commonly." (DX 5B).

Despite the fact that the autopsy finding may not warrant a diagnosis of "medical" pneumoconiosis, I note that "anthracosis" is specifically listed under the definition of pneumoconiosis set forth in 20 C.F.R. §727.202.

In view of the foregoing, I find that the interim presumption is invoked under §727.203(a)(1).

Pulmonary Function Studies

The record contains the results of pulmonary function studies performed by the miner on April 3, 1974, September 27, 1976, and June 6, 1980. For a person of the miner's height of approximately 68.5 inches, the qualifying values as set forth in §727.203(a)(2) are as follows: FEV1-2.4 and M W-96. Of the three pulmonary function tests, the 1974 is clearly not qualifying, the 1976 yielded qualifying values but has been found to be invalid due to less than optimal effort, and the 1980 test was qualifying and validated upon review.

In view of the progressive and irreversible nature of pneumoconiosis, the Court accords the most weight to the valid, 1980 study. Thus, I find that the interim presumption is also invoked under §727.703(a)(2).

Arterial Blood Gas Studies

Arterial blood gas studies were conducted on May 22, 1976 and June 6, 1980. The resting studies obtained by Dr. Goldstein in 1976 were not qualifying. No exercise

tests were conducted at that time. In 1980, Dr. Russakoff conducted both resting and exercise tests. The 1980 resting results were marginally above the qualifying values, while the exercise results were clearly qualifying. Furthermore, after calibration, the 1980 studies were deemed valid upon reevaluation by Dr. Kraman.

Although the 1980 studies are more probative than the 1976 test and suggest a significant impairment which may be totally disabling, the latter studies are only in equipoise. Since the "true doubt" rule has expressly been rejected, the Court concludes that the interim presumption has not been invoked under §727.203(a)(3). See Director, OWCP v. Greenwich Collieries, —— U.S.——, Case No. 93-744 (June 20, 1994).

Physicians Opinions

Although the record does contain a death certificate, which does not mention pneumoconiosis, and various physicians' reports regarding the biopsy, bronchoscopy, and autopsy, the crux of this case appears to focus on the conflicting opinions of Drs. Goldstein and Russakoff.

Dr. Goldstein examined the miner on September 27, 1976. In his initial report, Dr. Goldstein set forth the miner's coal mine employment history as 25 (20-22 in strip mines), a 40 year smoking history of slightly more than one pack per day, complaints of shortness of breath and productive coughing, and abnormal physical findings. His x-ray finding was negative for pneumoconiosis. The pulmonary function study results were qualifying. Although he noted "good" cooperation and comprehension, his results were deemed invalid on review. Dr. Goldstein also conducted resting blood gases which were not qualifying.

In pertinent part, Dr. Goldstein diagnosed chronic bronchitis, which he found "limited (the miner) to walk-

ing slowly-no heavy work." However, Dr. Goldstein marked the "No" box of the form report, indicating that the miner's chronic bronchitis was not related to coal mine employment (DX 13A).

Dr. Goldstein reexamined the miner in May 1979. Based upon the miner's history, complaints and clinical findings, Dr. Goldstein concluded:

> This 60 year old white man is being evaluated for the evaluation of pneumoconiosis. He has worked in industries where he has been exposed to coal dust but has no findings on chest x-ray that are consistent with pneumoconiosis. He does have findings that are consistent with chronic obstructive pulmonary disease and his pulmonary functions would be consistent with that as well. The degree of abnormality, however, is not severe. His blood gases show only a minimal reduction in the PO2, suggesting that there is no major abnormality of gas exchange, at least at rest. In carefully considering the history, physical examination, pulmonary functions, EKG, arterial blood gas and hemoglobin, I would not be able to support the clinical diagnosis of pneumoconiosis.

(DX 18A).

In a rather cursory supplemental letter to the Claims Examiner, dated July 18, 1979, Dr. Goldstein reiterated his finding of chronic obstructive pulmonary disease with no evidence of pneumoconiosis on x-ray. In addition, he noted that unspecified pulmonary function results were not qualifying for disability under "Federal guidelines."

Dr. Goldstein's most lengthy analysis is contained in his deposition testimony (See ALJ Simpson decision, pp. 13-15). In summary, Dr. Goldstein testified that the biopsy and autopsy findings as well as other clinical data confirmed his conclusions that the miner did not suffer

from pneumoconiosis and that the miner's respiratory problems were due to chronic obstructive pulmonary disease caused by cigarette smoking. Regarding the question of whether the miner suffered from a totally disabling respiratory or pulmonary impairment prior to his death, Dr. Goldstein's testimony was quite ambiguous, however. Specifically, Dr. Goldstein stated that he could not look at the pulmonary function results and make a statement one way or another, but he thought that the miner did not fit into one of the severe categories under the A.M.A. guidelines for disability (EX 4, p. 15).

The most recent full pulmonary examination in evidence was conducted by Dr. Russakoff on June 6, 1980. Based upon the miner's employment and smoking histories, complaints of shortness of breath and productive cough, various abnormalities on chest examination, a positive chest x-ray reading, qualifying pulmonary function studies which were interpreted as showing either a "mild" or "mild to moderate" obstructive ventilatory impairment, abnormal arterial blood gas studies which revealed a significant drop with exercise, Dr. Russakoff concluded:

> This individual clearly has significant pulmonary dysfunction. Although some of the obstructive changes on x-ray are consistent with his long history of cigarette smoking, the fall in oxygen tension is indicative of a more significant underlying disorder, which in my opinion, is related to his pneumoconiosis.

(DX 28A).

Based upon my analysis of the medical opinions, the Court finds that such evidence neither precludes nor establishes the presence of a totally disabling respiratory or pulmonary impairment. Accordingly, the interim presumption has not been invoked under §727.203(a)(4).

Applicable Regulations

Since the miner filed his application for benefits prior to April 1, 1980, this matter must be determined under Part 727 of the regulations.

Interim Presumption - Invocation

For the reasons outlined above, the Court concludes that the interim presumption is invoked under 20 C.F.R. §727.203(a)(1) and (a)(2).

Interim Presumption - Rebuttal

Since the Claimant is no longer employed, rebuttal under §727.203(b)(1) is no longer available. Furthermore, since the interim presumption has been invoked on the basis of the x-ray evidence, (b)(4) rebuttal is also unavailable.

Therefore, the only possible bases of rebuttal are subsections (b)(2) or (b)(3).

As set forth above, the earlier pulmonary function studies and arterial blood gas studies were not qualifying. However, it is well settled that such results, in and of themselves, are insufficient to rebut the interim presumption. Moreover, the more recent pulmonary function test results are qualifying. Furthermore, the latest arterial blood gas studies indicate a severe impairment and are qualifying after exercise. Accordingly, my focus turns to the physicians' opinions to determine whether the miner was not totally disabled, or whether such disability did not arise in whole or part from coal mine employment.

As discussed above, the Court finds that the medical opinions of Drs. Goldstein and Russakoff do not specifically address the total disability issue. Accordingly, for the purposes of rebuttal, the Employer has failed to meet its burden under §727.203(b)(2).

Finally, the Court concludes that the Employer has also failed to rebut the interim presumption under §727.203(b)(3). Although the evidence suggests that the primary cause of the miner's total disability was his significant history of cigarette abuse, the Employer has failed to establish that pneumoconiosis was not at least a contributing cause of such disability. *Alabama By-Products v. Killingsworth,* 733 F.2d 1511, 1516 n. 10, 6 BLR 2-59, 2-65 n. 10 (11th Cir. 1984). In making this determination, I credit the opinion of Dr. Russakoff over Dr. Goldstein, despite the latter's excellent credentials. In so finding, it is noted that Dr. Russakoff had the benefit of conducting the most recent pulmonary evaluation of the miner, and that, unlike Dr. Goldstein, he conducted an exercise arterial blood gas study. Furthermore, while Dr. Kraman, a pulmonary specialist for the Department of Labor, validated the pulmonary function and arterial blood gas studies administered by Dr. Russakoff, he deemed the pulmonary function results obtained by Dr. Goldstein to be invalid. Moreover, Dr. Goldstein's opinion is based, at least in part, upon his questionable finding that the miner did not even have pneumoconiosis.

Since Dr. Russakoff's opinion is well reasoned and most consistent with the miner's extensive history of coal mine employment, his subjective complaints, recent positive chest x-ray evidence, some of the biopsy and autopsy findings, most recent pulmonary function results, and most recent qualifying arterial blood gas results with exercise, I accord it the greatest weight. Therefore, it is found that the Employer has failed to rebut the interim presumption under §727.203(b)(3), or by any other means. Accordingly, the Claimant is entitled to benefits under the Act and applicable regulations promulgated thereunder.

Onset of Disability and Entitlement to Benefits

Benefits are payable to a miner who is totally disabled due to pneumoconiosis beginning with the month of onset of total disability, where such month of onset can be established. 20 C.F.R. §725.503(b).

As outlined above, the clinical evidence, in particular the chest x-ray readings, valid pulmonary function tests and arterial blood gas studies, establish a progression in the miner's disease and resulting disability. Prior to June 1980, the preponderance of the chest x-ray evidence was negative for pneumoconiosis, and the valid pulmonary function studies and arterial blood gases were clearly nonqualifying. As of June 1980, the preponderance of the x-ray evidence was positive for pneumoconiosis, the valid pulmonary function results were qualifying, the resting arterial blood gas values were only slightly above the qualifying criteria, and the blood gases after exercise were qualifying. Accordingly, the Court finds that the month of onset of total disability due to pneumoconiosis is June 1980. Therefore, the miner would be entitled to benefits as of June 1, 1980. Such miner's benefits are to be augmented by reason of his dependent spouse, Mary Gamble. The miner's benefits would cease as of August 31, 1982 (*i.e.,* the month before the miner died). 20 C.F.R §725.503(b)(1). However, since the miner is deceased, all underpayments, if any, are payable to his surviving spouse, Mary Gamble. 20 C.F.R. §725.545(c)(1).

Since the pre-1982 miner's claim is granted, the widow is automatically and derivatively entitled to widow's benefits. 20 C.F.R. §725.212(a)(3)(ii). Her entitlement to survivor's benefits shall commence as of September 1, 1982, the beginning of the month in which the miner died, and continue so long as she remains a qualified survivor. 20 C.F.R. §725.213 and §725.503(c).

Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein since no application has been received. Thirty days is hereby allowed to Claimant's counsel for the submission of such an application and attention is directed to 20 C.F.R. §725.365 and §725-366 of the regulations. A service sheet showing that service has been made upon all parties, including the Claimant, must accompany the application. Parties have ten days following receipt of such application within which to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

IT IS HEREBY ORDERED that the Employer, Mitchell & Neeley, Inc., shall pay Mary Gamble all benefits to which she and her late husband, James W. Gamble, are entitled to receive under the Act, commencing as of June 1, 1980.

IT IS FURTHER ORDERED that the Employer, Mitchell & Neeley, Inc., shall reimburse the Secretary of Labor for payments under the Act paid from the Black Lung Disability Trust Fund to the Claimant and/or her deceased spouse, and deduct such amounts, as appropriate, from the sum it is ordered to pay under paragraph 1 above.

/s/ James W. Kerr, Jr.

JAMES W. KERR, JR.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. 725.481, any party dissatisfied with this Order may appeal to the Benefits Review Board, 800 K Street, Suite 500, Washington, D.C. 20001-8001. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Frances Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

SERVICE SHEET

Case Name: JAMES W. GAMBLE (DECEASED), MARY GAMBLE (WIDOW)

Case No.: 88-BLA-2308, BRB NO. 89-1654 BLA

Title of Document: DECISION AND ORDER: AWARDING BENEFITS

A copy of the above document was sent to the following:

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In the Matter of	)	
	)	
MARY GAMBLE	)	
(Widow of JAMES W. GAMBLE)	)	
Claimant	)	Date Issued:
	)	April 5, 1989
against	)	
	)	
MITCHELL & NEELY, INC.	)	Case No.
Employer	)	88-BLA-2308
	)	
and	)	OWCP No.
	)	419-16-2738
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
Party-in-interest	)	

PATRICIA G. FRALEY and
WILLIAM Z. CULLEN
For the Claimant

M. CLAY RAGSDALE, IV,
For the Employer

DEBRA H. GOLDSTEIN
For the Party-In-Interest

BEFORE: A. A. Simpson, Jr.
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This proceeding arises from a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act, 30 U.S.C. section 901, *et seq.* (here-

inafter referred to as the Act). The case was referred to the Office of Administrative Law Judges by the Deputy Commissioner, Office of Workers' Compensation Programs.

Benefits are provided under the Act to a miner who is totally disabled due to pneumoconiosis and to certain survivors of a miner, who died due to or while totally (or in certain cases, partially) disabled by pneumoconiosis. Pneumoconiosis means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments arising out of coal mine employment.

By proper notice to all the parties a hearing was held in this matter on November 7, 1988. Pursuant to 20 C.F.R. §725.465, the Director's exhibits, which are numbered 1A through 60A and 1B through 41B were offered into evidence and admitted without objection. The parties were afforded full opportunity at the hearing to present additional evidence whereupon the claimant offered the following documents which were marked respectively as claimant's exhibits number 1 through 4: (1) the October 10, 1988 re-reading by Dr. James C. Walker of the May 22, 1979 x-ray; (2) the October 10, 1988 re-reading by Dr. James C. Walker of the June 6, 1980 x-ray; (3) a bronchoscopy report, dated June 23, 1981, and a biopsy report, dated June 24, 1981, from the University of Alabama Hospital in Birmingham; and (4) statements of wages paid to the claimant by the employer in late 1970. The employer in turn offered the following evidence identified as employers exhibits 1 through 4: (1) the September 16, 1988 re-reading by Dr. Allan R. Goldstein of the May 22, 1979 x-ray; (2) the September 16, 1988 re-reading by Dr. Allan R. Goldstein of the June 6, 1980 x-ray; (3) the September 26, 1988 re-reading by Dr. Allan R. Goldstein of the September 27, 1976 x-ray; and (4) the September 13, 1988 deposition of Dr. Allan R. Goldstein. Finally, a letter to this office from the

employer's attorney, dated July 22, 1988, to which was attached a copy of his earlier letter, dated February 29, 1988, to the Deputy Commissioner was entered into the record as administrative law judge exhibit number 1, over the objection of the claimant as to the timeliness of any new issues the letter might raise. At the close of the hearing the parties were allowed forty-two days in which to file briefs, a period which was extended by fourteen days upon request of the employer.

The findings of fact and conclusions of law which follow are prepared upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law.

STATEMENT OF THE CASE

The miner, James W. Gamble, filed his claim for black lung benefits on March 19, 1974 (DX-1A)[1], notice of which was sent to Cowan and Company, Inc., a previous employer of the claimant, on April 17, 1979. (DX-16A). The operator's notice of controversion was timely filed (DX-17A) and the claim was initially denied on September 6, 1979 (DX-22A). Upon the miner's request for a formal hearing (DX-23A), the matter was referred to the Office of Administrative Law Judges (DX-24A). The operator requested that the statement of contested issues as prepared by the Deputy Commissioner be amended to correctly reflect all the issues disputed by the parties (DX-25A, 27A and 38A). A hearing was held in this mat-

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[1]In this decision, "DX" refers to the Director's exhibits; "CX" refers to the Claimant's exhibits; "ALJ" refers to the Administrative Law Judge's exhibits; and "Tr." refers to the transcript of the hearing.

ter on November 18, 1982 (DX-41A). By Decision and Order of Administrative Law Judge Edward J. Murty, dated February 1, 1983, Cowan and Company, was dismissed as the responsible operator and the case was remanded to the Deputy Commissioner for further action (DX-44A). Or. March 9, 1983, the Director filed a Notice of Appeal with the Benefits Review Board for a review of Judge Murty's decision (DX-45A).

In the meantime, upon the miner's death on September 28, 1982, his widow, Mary Gamble, filed a claim for survivor's benefits under the Act on May 2, 1983. The claims examiner sent a copy of this claim to Cowan and Company on May 19, 1983, with the further advisory that even though the company had been dismissed as the responsible operator by the administrative law judge, it would still be considered a party-in-interest while the matter was on remand to the Deputy Commissioner's office, pending a decision on appeal by the Board (DX-13B). On May 20, 1983, two Operator Notification Forms were sent to Mitchell and Neely, Inc., another previous employer of the miner, one notifying it of the miner's claim and the other serving as notice of the widow's claim (DX-11B and 12B). A conference was held on July 20, 1983, out of which two memorandums of conference were issued on November 8, 1983 (DX-18B). In the first memorandum, which related to the miner's claim, the Deputy Commissioner conceded that jurisdiction rested with the Board, but in order to be able to make determinations as to the widow's claim he proceeded to find that at least as of the time of death, the miner was totally disabled with coal workers' pneumoconiosis (DX-18B(2)). In the second memorandum which was specific to the widow's claim, the Deputy Commissioner noted his election to join the two claims and after incorporating the findings of the preceding memorandum determined that the widow was entitled to interim benefits as

of September, 1982 (DX-18B(12) and 20B). As to each claim, the Deputy Commissioner further determined that Cowan and Company was the responsible operator. On November 23, 1983, the claimant, who accepted these determinations except with respect to the onset date of the interim payments to the widow, requested a hearing before an administrative law judge on this issue (DX-20B). On December 27, 1983, the Deputy Commissioner, assuming that the named responsible operator would dispute the findings, placed the widow on interim pay to be made from the trust fund until the claim could be finally decided (DX-22B). Cowan and Company then formally controverted the widow's claim (DX-23B), which controversion was accepted as timely (DX-24B). The Deputy Commissioner referred the widow's claim to the Office of Administrative Law Judges for eventual consolidation with the original miner's claim which was presently before the Board (DX-25 and 26). Upon a motion by the employer which was joined in by the claimant, Administrative Law Judge Ben H. Walley continued the matter and on November 18, 1985, remanded it to the Deputy Commissioner until the Board's decision on the miner's claim could be rendered (DX-36B).

By Decision and Order, dated October 29, 1986, the Board determined that an improper legal standard had been used in deciding whether the claimant was a miner while employed by Cowan and Company for purposes of determining if this employer was the responsible operator and remanded the matter back to the Administrative Law Judge for a decision consistent with its ruling (DX-55A). On January 19, 1988, Administrative Law Judge Murty issued a Decision and Order on remand finding that while the claimant had worked nineteen years as a miner prior to his employment with Cowan and Company, he had only accrued four months of coal mine employment with the company and, therefore, Cowan

and Company could not be properly designated as the responsible operator. The matter was again remanded to the Deputy Commissioner for a determination consistent with the opinion (DX-60A).

The Deputy Commissioner consolidated the miner's and the widow's claims. By letter decision, dated February 22, 1988 (DX-37B), he advised the claimant that the November 8, 1983, conference decision as to the miner's claim was not valid since the Deputy Commissioner had not had jurisdiction to reconsider the claim at that time. He further vacated the November 8, 1983, conference decision as to the widow's claim determining that it had not been decided under the appropriate regulations. Finally, pursuant to Judge Murty's decision, he released Cowan and Company and designated Mitchell and Neely, who had first been notified of the two claims on May 23, 1983, as the responsible operator, noting that no controversion had been received as yet. By letter dated February 29, 1988, the claimant objected to these new determinations as they affected the continued payment of benefits to the widow and requested a formal hearing (DX-38B). On that same date, Mitchell and Neely formally controverted the widow's claim (ALJ-1(2)). Because an informal conference could not be held at that time, the Deputy Commissioner prepared an in-depth De Novo Reconsideration of all the evidence on March 21, 1988 (DX-39B) finding that the miner was entitled to black lung benefits as of June 6, 1980, and that the widow was entitled to benefits on the survivor's claim from the time of the miner's death. Mitchell and Neely was determined to be the coal company for whom the claimant had worked his most recent coal mine employment, some part of which was subsequent to December 31, 1969. The designated operator filed a notice of controversion on April 6, 1988, and requested a formal hearing before an administrative law judge (DX-40B).

The matter was referred to this office on May 27, 1988 (DX-41 B), and Mitchell and Neely was allowed thirty days from July 14, 1988, to serve notice on the parties of its intentions to contest its designation as the responsible operator. On July 22, 1988, Mitchell and Neely requested that the list of contested issues prepared and referred to this office by the Deputy Commissioner be expanded to included certain sub-issues relating to the recognized issue of whether it was the responsible operator. On October 7, 1988, Mitchell and Neely filed a Notice of Contest as Responsible Operator contesting its designation as the responsible operator on several grounds. On October 31, 1988, the Director filed its response and by Order of that same date, consideration of the Employer's Notice of Contest was held in abeyance pending completion of the hearing.

The miner, James W. Gamble, was born on August 30, 1919, and was 63 years old at the time of his death on September 28, 1982. He had a seventh grade education. The deceased was married but once to Mary Etheleen Gamble on March 7, 1942. On his claim application, the miner listed no children who would qualify as dependents for purposes of augmentation under the Act.

ISSUES

The specific issues referred for consideration by the Deputy Commissioner are as follows:

1. Whether the miner had pneumoconiosis as defined by the Act and the regulations;
2. Whether the miner's pneumoconiosis arose out of coal mine employment;
3. Whether the miner was totally disabled;
4. Whether the miner's disability or death was due to pneumoconiosis; and

5. Whether the named-employer is the responsible operator.

Upon referral of the matter to this office, the named operator requested that certain sub-issues relating to whether it is the responsible operator also be considered. It should be pointed out that due to geographical constraints, the deputy commissioner was unable to hold an informal conference in this matter at which the parties could discuss and fully delineate the contested issues. Since the additional issues which the named-operator has raised are subsumed within and pertinent to a resolution of issue no. 5 above, which was before the Deputy commissioner and referred by him to this office as a contested matter, I will consider them herein. Accordingly, the list of issues is expanded to include the following:

6. Whether the miner worked as a miner for the named-operator after December 31, 1969;
7. Whether the miner's most recent period of cumulative employment of not less than one year was with the named-operator; and
8. Whether the named-operator can be liable for benefits awarded to the miner.

FINDINGS OF FACT AMD CONCLUSIONS OF LAW

Coal Mining Employment

The issue of whether the claimant was a coal miner and the length of coal mine employment was previously decided by Administrative Law Judge Murty in his Decision and Order, dated January 19, 1988. Judge Murty determined that the claimant had accrued nineteen years of coal mine employment while he worked as a miner from 1950 through 1970 for Mitchell Brothers Construction Company and its successor corporation, Mitchell and Neely, Inc. During this period of time the claimant worked at a strip mine as a surface coal truck

driver transporting unprocessed coal from the pit to the washer. Clearly, the coal was still in the course of being processed and not yet a finished product and the work performed was a function integral to the coal production process. *See Whisman v. Director, OWCP,* 8 BLR 1-97 (1985). He was exposed to coal dust while coal was loaded onto or dumped from the truck as well as while transporting it over unpaved roads covered with coal dust. Judge Murty further determined that the claimant had accrued an additional four months of coal mine employment while working for Cowan and Company, a coal mine construction company, from January 8, 1973 until his retirement on December 28, 1976. I concur in Judge Murty's determinations that the claimant worked as a coal miner during his employment with the two Mitchell companies and that he accrued during his entire employment history a total of nineteen years and four months of coal mine employment. Furthermore, I adopt his determinations herein for purposes of the widow's claim which was not before Judge Murty at the time of his decision.

Responsible Operator

Mitchell and Neely contends that it is not the responsible operator and therefore is not liable for any benefits to which the claimants may be entitled under the Act. The responsible operator is that employer with whom the miner had his last cumulative year of coal mine employment. 20 C.R.F. §725.493(a)(1). Furthermore, direct employer liability for payment of claims can only result where the miner ceased coal mine employment after December 31, 1969. 20 C.R.F. §725.492(a)(3). The miner herein worked as a surface coal truck driver at a strip mine for Mitchell and Neely from January 1, 1964 through November 2, 1970 (DX-5A) and, as has already been determined, this work constituted coal mine em-

ployment. Furthermore, that the claimant worked at least one day after December 31, 1969 for Mitchell and Neely is evidence by his Federal Wage and Tax statement for 1970 showing substantial earnings from the employer in that year (DX-3A) and by wage statements issued directly by the employer in October, 1970 (CX-4).

The employer also contends that it was not proper for the deputy commissioner to designate it as the responsible operator after the matter was already litigated with Cowan and Company as the putative responsible operator. This argument is based on the Board's holding in *Crabtree v. Bethlehem Steel Corporation,* 7 BLR 1-354 (1984) in which it held that the department of Labor must resolve the responsible operator issue in a preliminary proceeding and/or proceed against all putative responsible operators at every stage of the adjudication in order to promote both due process of law and efficient administration of the Act. In order to properly decide this issue, it is necessary to analyze the procedural path of both the miner's and the widow's claim.

Upon the filing of the miner's claim on March 19, 1974, the Deputy Commissioner sent a Notice of Claim to only one of the miner's previous employer, Cowan and Company, advising it of its potential liability as the responsible operator. The employer timely controverted the claim and the claims examiner denied benefits. The matter was next referred to Administrative Law Judge Murty for a hearing. Judge Murty dismissed Cowan and Company as the responsible operator and the Director appealed this decision to the Board where the claim was still pending when the claims examiner attempted to retake jurisdiction and join the miner's claim with the newly filed widow's claim. The claims examiner sent an Operator Notification Form to Mitchell and Neely advising it of its potential liability on the miner's claim. This notice was invalid and could not serve to make Mitchell

and Neely a party with respect to miner's claim since the Deputy Commissioner did not have jurisdiction while it was still pending before the Board. The claims examiner then, inappropriately, redecided the miner's claim to the extent he felt was necessary to also allow determinations on the widow's claim. He found that, at least as of the time of death, the miner had totally disabling pneumoconiosis and that, in contradiction to Judge Murty's decision, Cowan and Company was the responsible operator.

Nearly three years later, the Board rendered its decision on the miner's claim finding that Judge Murty had used an improper legal standard in determining whether the miner was a coal miner during its employment with Cowan and Company. The matter was remanded to the Administrative Law Judge who reconsidered the evidence under the correct standard and once again determined that Cowan and Company was not the responsible operator. Judge Murty remanded the matter back to the Deputy Commissioner. The claims examiner admitted that the earlier decision on the miner's claim made while it was still pending before the Board was improper as the Deputy Commissioner did not have jurisdiction at that time. That decision was vacated and then, in accordance with Judge Murty's decision, the claims examiner released Cowan and Company and identified Mitchell and Neely as the primary responsible operator. I find that this action as it related to the miner's claim was improper under *Crabtree* and that the deputy commissioner was not entitled to a second opportunity to identify another putative responsible operator on the miner's claim this late in the proceedings. Such piecemeal litigation is not compatible with the efficient administration of the Act and the expeditious processing of claims. Therefore, the Deputy Commissioner's later De Novo Reconsideration of the entire matter in which he found that the miner was eli-

gible for benefits under part 727 of the regulations is not effective as to Mitchell and Neely.

Mitchell and Neely's status as the responsible operator vis-a-vis the widow's claim must also be determined. This claim was filed on May 2, 1983, while the miner's claim was pending before the Board. Shortly thereafter, the claims examiner sent separate notices of the claim to both Cowan and Company and Mitchell and Neely as putative responsible operators. This action was proper under section 725.412(d) which allows for notification of all operators when there is a dispute as to who is liable for the payment of benefits. It was also in accord with the mandate in *Crabtree* to identify all putative operators and resolve who is responsible for benefits in one proceeding or to proceed against all putative operators at every stage of the claim's adjudication. While Mitchell and Neely did not formally controvert the claim at this time, Cowan amd Company was determined by the claims examiner to be the responsible operator as to the widow's claim. The claims examiner further found that the widow was entitled to benefits. The matter was referred to Administrative Law Judge Walley, who remanded it back to the Deputy Commissioner until the Board's decision on the miner's claim could be rendered. Once the Board issued its decision which ultimately led to the dismissal of Cowan and Company as the responsible operator on the miner's claim, the claims examiner dismissed that company with respect to the widow's claim as well and elevated Mitchell and Neely to the position of primary responsible operator. It is important to note that unlike the situation in *Crabtree,* or even in the miner's claim herein, Mitchell and Neely had received notification of its potential liability on the widow's claim at the outset of the proceedings on that claim. I therefore find that Mitchell and Neely was properly designated as a putative responsible operator with regard to the widow's claim

and has remained a party to that claim throughout these proceedings.

The Miner's Claim

In his De Novo Reconsideration of the entire matter on March 23, 1988, the Deputy Commissioner determined that the Mitchell and Neely was liable for benefits on the miner's claim from June 6, 1980, the date the miner's pneumoconiosis was medically determined to be totally disabling, until the miner's death in September, 1982. Since I have determined that under *Crabtree,* Mitchell and Neely cannot be the responsible operator as to this claim, liability for benefits must fall to the trust fund. As the director has not contested entitlement, there are no further issues before me regarding this claim.

The Widow's Claim

The Deputy Commissioner further determined in his De Novo Reconsideration of this matter on March 23, 1988, that Mitchell and Neely was liable for the payment of benefits to the widow from the date of miner's death. This award was based merely on the conversion of the miner's benefits to the widow at his death and not upon a separate analysis of the widow's claim. Because *Crabtree* precludes liability on the part of Mitchell and Neely as to the miner's claim where it was not named as a party to that litigation from the outset and did not have an opportunity to participate in all the proceedings, it is only a natural extension of that case to hold that Mitchell and Neely cannot be liable on the widow's claim where such liability is contingent solely upon determinations made during adjucation of the miner's claim. Whether Mitchell and Neely is liable as the responsible operator on the widow's claim can only be determined by a separate and independent analysis of the widow's claim.

The widow filed her claim on May 2, 1980, after the effective date of 20 C.F.R. Part 718, and it must be adjudicated under the provisions of Part 718 and 725 of the regulations. A surviving spouse of a miner is entitled to benefits on a claim filed after January 1, 1982, only if it can be determined that the miner's death was due to pneumoconiosis.

Medical Evidence

For purposes for analyzing this claim, the medical evidence is summarized below:

(a) X-ray Studies

Date	Date Read	Exhibit	Doctor/Qualifications[2]	Readings
09/27/76	09/27/76	DX-15A	Allan R. Goldstein; not qualified as a "B" reader until 1981	no findings of pneumoconiosis; calcification in small parenchymal opacities
09/27/76	11/11/76	DX-14A	Fred P. Stitik; qualifications not stated	0/0 small rounded opacities; 1/2 small irregular opacities, type "s", in all six lung zones
09/27/76	12/15/82	DX-14B(4)	William B. Hayes; "B" Reader	0/0 calcified granuloma in upper left lobe
09/27/76	06/29/83	DX-9B(1)	W. S. Cole; BCR and a "B" reader	completely negative; calcified granuloma, left upper lobe
09/27/76	09/26/88	EX-3	Allan R. Goldstein; "B" reader	no pleural or parenchymal abnormalities consistent with pneumoconiosis; left upper lobe calcification
05/22/79	05/23/79	DX-18A(4)	Allan R. Goldstein; not a "B" reader until 1981	no pneumoconiotic nodules; calcification in the left upper lung field in the first anterior interspace

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[2]In this opinion, "B" refers to a "B" reader, "BCR" refers to a Board Certified Radiologist, "BER" refers to a Board Eligible Radiologist.

05/22/79	07/16/82	DX-14B(3)	William B. Hayes; "B" reader	0/0; questionable evidence of pulmonary emphysema; old calcified granulomatous disease in left upper lobe lobe
05/22/79	09/16/88	EX-1	Allan R. Goldstein; "B" reader	no pleural or parenchymal abnormalities consistent with pneumoconiosis; calcified granuloma, left upper lobe
5/22/79	10/10/88	CX-1	James W. Walker; "B" reader	small rounded and irregular opacities of "p" and "s" size and shape throughout all six lung zones of 1/0 profusion; no large opacities or pleural chan ges of pneumoconiosis; several calcified granulomata
06/06/80	06/06/80	DX-28A(6)	A. David Russakoff; "B" reader	1/0 small rounded opacities, type "p", four upper lung zones; 0/0 small irgular opacities; calcified granuloma at upper lobe, medially
06/06/80	06/28/83	DX-14B(5)	William B. Hays; "B" reader	0/0; calcified granuloma in left apical posterior segment; mild fibronodular infiltrates probably result of previous granulomatous; diaphragm low and somewhat flat might indicate emphysema
06/06/80	08/01/83	DX-17B(2)	James W. Ballard; BCR and "B" reader	small rounded opacities throughout six lung zones of "p" size with 1/0 profusion; possible mass lesion in apical portion of right lung
06/06/80	09/16/88	EX-2	Allan R. Goldstein; "B" reader	no parenchymal or plural abnormalities consistent with pneumoconiosis; calcified granuloma, left upper lobe

06/06/80	10/10/88	CX-2	James C. Walker; "B" reader	multiple opacities of "s" and "p" shape and size of 1/0 profusion; no pleural change suggestive of pneumoconiosis; no large opacities; diaphragm flattened compatible with some degree of emphysema, calcified granulomata; only change from 05/22/79 is some increased opacity in right apex medially, a possible lung mass

(b) Pulmonary Function Studies

Date	Exhibit	Doctor	Age	Ht.	FEV_1	MVV	FVC	Tracings	Cooperation
04/03/74	DX-6B(2)	Goodman	54	$68^1/_2$	2.64	104.5		Yes	Good
	Note: vents found acceptable by Kraman on 06/03/83, but stated FEV_1 % predicted wrong (Fev_1 should be 2.85) and no correction for BTPS (DX-6B(1)								
09/27/76	DX-11A & 18A(5)	Goldstein	57	69"	1.69	41.65	2.89	Yes	Good
	Note: vents found unacceptable by Kraman on 6/03/83 due to less than optimal effort, cooperation and comprehension (DX-7B(1))								
06/06/80	DX-28A(4) & 15B(1)	Russakoff	60	68"	2.10	62		Yes	Good
	Note: vents found acceptable by Kraman on 10/16/83 (DX-8B(2)								

(c) Arterial Blood Gas Studies

Date	Exhibit	Doctor	Rest pCO_2	Rest pO_2	Exercise pCO_2	Exercise pO_2
05/22/76	DX-18A(5)	Goldstein	33	74	—	—
06/06/80	DX-28A(7) & 15B(1)	Russakoff	32.5	69.2	28.9	65.2

Note: test initially found not technically acceptable by Kraman on 06/06/83 (DX-8B(11)); however, after Russakoff submitted a statement as to calibration and time (DX-17B(3)), test was found acceptable upon re-evaluation by Kraman on 10/16/83 (DX-8B(2))

(d) Physician Reports

1. Report of Physical Examination, dated September 27, 1976 and prepared by Dr. Allan R. Goldstein. Dr. Goldstein, who examined the miner on this date, also took a chest x-ray (DX-15A) and conducted pulmonary function tests (DX-11A). The doctor noted a 25-year history of coal mine employment, most of which was at a strip mine, and forty years of smoking slightly over one pack of cigarettes per day. His medical history included no orthopnea, but indicated that the miner was receiving x-ray therapy for stomach cancer. The patient's symptoms included a four to five year morning cough with phlegm production and shortness of breath upon climbing and lifting or even walking at ground level unless going very slowly. An examination of the chest revealed hyper-resonance, low diaphragmetic movement, decreased breath sounds, no rales, rhonchi or wheezes. The chest x-ray was negative as to pneumoconiosis, the only finding being calcification in the small parenchymal opacities (DX-15A). The pulmonary function tests showed minimal reduction in the vital capacity with moderate reduction in the flow rates consistent with chronic obstructive pulmonary disease (DX-11A). Dr. Goldstein diagnosed the patient as suffering from chronic bronchitis and stomach tumor, specifically stating that the diagnosed condition was not related to dust exposure in the miner's coal mine employment. He further found that the patient's chronic respiratory or pulmonary disease limited his activity to walking slowly with no heavy work.

In a letter response, dated June 14, 1977 (DX-12A), to an inquiry from the claims examiner regarding his medical report, Dr. Goldstein opined that there was no connection between working in a coal mine and the stomach tumor, that the miner's shortness of breath was caused by chronic bronchitis rather than pneumoconiosis, that the x-ray did not show the typical findings of coal workers'

pneumoconiosis, and that the pulmonary function tests were consistent with the miner's smoking history.

2. Medical Report of Dr. Goldstein, prepared for the first named-employer, Cowan and Company, on May 23, 1979 (DX-18A. Dr. Goldstein examined the miner at this time and also relied on a chest x-ray, pulmonary function tests, and arterial blood gas studies. He noted a twenty-four year history of coal mine employment, twenty of which had been spent hauling coal. Further history indicated that the miner did not drink, but had smoked since he was about twenty years old at a rate of one to one and a half packs a day until 1977 when he quit. His past medical history included lymphoma of the stomach, removal of a kidney stone, hemorroidectomy, and removal of a left leg tumor. Upon examination, his chest was hyper-resonant with diaphragms that moved poorly and a few rales in the right mid-posterior chest, but there were no wheezes or rhonchi and breath sounds were decreased bilaterally. A chest x-ray revealed flattening of the diaphragm with a slight increase in the retrosternal air space and calcification in the left upper lung field in the first anterior interspace, but *no* pneumoconiotic nodules. The pulmonary function tests showed minimal reduction in the vital capacity and FEV1 with a moderate to severe reduction in the mid-flow consistent with small airways dysfunction. The miner's blood gas studies showed only a minimal reduction in the PO_2, suggesting that there was no major abnormality of gas exchange, at least at rest. Despite the miner's history of work in industries where he was exposed to coal dust, Dr. Goldstein could find nothing on the chest x-ray consistent with pneumoconiosis. He further opined that the findings of the pulmonary function tests were consistent with chronic obstructive pulmonary disease, but that the degree of abnormality was not severe. On the basis of history, physical examination, pulmonary functions, EKG,

arterial blood gases and hemoglobin, Dr. Goldstein stated that he could not support a clinical diagnosis of pneumoconiosis.

In a letter response, dated July 18, 1979 (DX-20A), to further the claims examiner, Dr. Goldstein confirmed his diagnosis of chronic obstructive pulmonary disease with no findings on chest x-ray consistent with pneumoconiosis. By further letter, dated July 24, 1979, he stated that the miner's chronic pulmonary disease could not have been aggravated by his exposure to coal dust while employed by the most recent coal mine employer, Cowan and Company.

3. Medical Report of Dr. A. David Russakoff, dated June 11, 1980 (DX-28A). Dr. Russakoff examined the miner on June 6, 1980, took a chest x-ray, and conducted an EKG, pulmonary function tests, and resting arterial blood gas studies. The doctor noted the miner's complete work history, including his coal mine employment. The miner's medical history included an operation and irradiation therapy for a stomach lymphoma, a kidney stone operation, removal of a leg tumor, a hemorrhoid operation and one episode of pneumonia as a child. The miner, who began smoking at the age of twenty, consumed up to two packs per day until several years ago when he cut back to the half-a-pack a day he smoked at the time of this examination. His symptoms included a chronic cough and phlegm production beginning six years ago with the cough and sputum production occurring all day and occasionally at night. The miner began experiencing shortness of breath six years previously and at present could only walk two to three blocks without becoming dyspneic. He awakened occasionally at night because of coughing. Upon examination of the chest, percussion note was found to be hyper-resonant and ascultation revealed definite expiratory delay with some slight expiratory wheeze on forced expiration with associ-

ated rhonchi. Inspiration was clear. A chest x-ray showed some fine nodular densities consistent with pneumoconiosis lesions present in minimal profusion in the upper lung zones bilaterally, with some paucity of markings in the periphery of the lung zones at the bases. A calcified granuloma in the left upper lung zone, medially, and depressed diaphragms were also noted. Dr. Russakoff interpreted the x-rays as positive for pneumoconiosis, type "p", with profusion 1/0 in the upper and mid-lung zones bilaterally and, on the basis of mild overinflation, as also consistent with mild emphysema. The pulmonary function tests were compatable with a mild obstructive ventilatory impairment. The blood gas studies were abnormal in that the arterial oxygen level was lower than would be anticipated for a man of his age and for the degree of hyperventilation as evidenced by the low arterial carbon dioxide tension. There was also a clearly abnormal response to exercise which was far more severe than would be anticipated from the degree of airway obstruction present.

On the basis of the above, Dr. Russakoff diagnosed his patient as suffering from: (1) occupationally related pneumoconiosis, as evidenced radiographically by work history; (2) chronic obstructive pulmonary disease of mild to moderate degree; (3) significant pulmonary dysfunction, as evidenced by hypoxia on arterial blood gas testing; and (4) unrecurring stomach lymphoma. He further commented that the obstructive changes on x-ray were consistent with the miner's long history of cigarette smoking, but noted that the fall in oxygen tension was indicative of a more significant underlying disorder, which in his opinion was related to pneumoconiosis.

4. Autopsy Report, dated September 29, 1982, prepared by Dr. Robert W. Mowry (DX-5B). The autopsy revealed severe emphysema in both lungs evidenced by abnormally large air spaces which seemed worse in the

upper than in the lower lobes. Ir. the left lung there was a calcified granuloma but no significant focal lesions. In the lower right lobe there was residual bronchogenic carcinoma with extensive spreading to the bronchopulmonary lymph nodes. Purulent bronchitis was also noted. However, grossly, there was no nodular fibrosis to suggest silicosis. Finally, it was noted that the degree of anthracosis was at least moderate but not greater than that seen commonly.

5. Report, dated June 23, 1981, of Bronchopscopy conducted by Dr. Lawrence Fox, with attached biopsy results (CX-3). The operative procedures performed on the miner included a bronchoscopy, a mediastinoscopy, a right thoracotomy, and exploration. The biopsy of the right upper lobe revealed fibrosis with anthracotic pigmentation and multiple small foci of adenocarcinoma, probably broncho-alveolar in type. The right lower lobe revealed pulmomary interstitial fibrosis with multiple pigmented macrophages and a purulent inflammatory exudate, but no tumor. Finally, biopsy of the parahilar area revealed a lymph node with extensive histiocytosis and anthracotic pigmentation, but no tumor. In his report of the thoracotomy procedure, Dr. Fox noted a large tumor mass in the lateral aspect of the right lower lobe, with additional tumor in the fissure between the middle and lower lobes and several small foci of dimpling lesions in the upper lobe, one of which was demonstrated to be a small focus of carcinoma. On the basis of these findings, a post-operative diagnosis of pulmonary carcinoma of the right lower and upper lobes was made.

6. Death Certificate, dated September 28, 1982 (DX-4B). The death certificate, prepared by Dr. William E. Goetter, listed cardiopulmonary arrest arising from bronchoalucolar carcinoma as the immediate cause of death and noted gastric lymphoma as another significant condition.

7. Deposition of Dr. Allan R. Goldstein on September 13, 1988. Dr. Goldstein, who lists his specialty as internal medicine and pulmonary disease and has seen an extensive number of patients for black lung, saw the miner on May 22, 1979 and had earlier read a chest x-ray on September 27, 1976. His physical exam and history were comprehensive and not just specific to black lung. In reviewing his previous reports, Dr. Goldstein noted that the pulmonary function tests showed a vital capacity slightly reduced and a midflow more reduced than would be expected, indicating a definite degree of obstruction in the small airways. However, he did not feel the results would fit into a category of severe limitation and when considered together with the miner's symptoms, were consistent with chronic obstructive pulmonary disease secondary to smoking. The blood gas studies revealed a minimum reduction in PO_2 and the chest x-ray showed no indication of pneumoconiosis. Upon considering the patient's history, physical examination, pulmonary function, EKG, arterial blood gases and hemoglobin, Dr. Goldstein could not support a clinical diagnosis of pneumoconiosis, but felt his findings were consistent with chronic obstructive pulmonary disease. It was his medical opinion that the miner did not have an occupationally-related dust disease.

Dr. Goldstein stated that a pulmonary disability from smoking could be distinguished from that caused by coal dust exposure by an absence of pneumoconiosis on x-ray along with physical examinations and pulmonary function tests. He noted that obstructive lung function was classical in cases of cigarette smoking, whereas fibrosis resulted in a restrictive effect, further explaining that in coal dust exposure the coal macules were in the respiratory bronchials. It was his experience that patients with chronic bronchitis and emphysema were smokers. Dr. Goldstein did not believe coal dust to be an aggravating

factor or contributing factor to emphysema. Furthermore, he did not feel that emphysema or cancer, unless perhaps it was a progressive massive fibrosis with a cancer in the middle, would mask pneumoconiosis, especially where an autopsy was performed.

In addition to reviewing his own reports, Dr. Goldstein also evaluated the other medical evidence of record. He felt that Dr. Russakoff's findings of emphysema, mild obstructive ambulatory impairment, chronic obstructive pulmonary disease, hypoxia and low oxygen were consistent with his own and only disagreed with Dr. Russakoff's positive x-ray findings, his interpretations of the blood gas studies, and his diagnosis of occupationally-related pneumoconiosis. As to the blood gas studies, Dr. Goldstein did not believe that the results were decidedly abnormal, but that they merely fell within the range of standard error in the equipment.

As to the bronchoscopy and lung biopsy, Dr. Goldstein again found nothing contradictory to his own findings. He explained that "multiple pigmented macrophages" listed as present in the report were merely cells normally found in the lungs whose normal function was to pick up dust particles. In explaining the finding of "fibrosis with anthracotic pigmentation," Dr. Goldstein noted that anthracotic pigmentation only refers to dust in general and not to a specific type of dust such as coal dust. He further noted that anyone could get anthracotic pigmentation just from breathing air. As to the term "fibrosis," he explained that it was also non-specific and could simply mean in this case fibrosis associated with and adjacent to the lung tumor. He did not believe that this finding said anything about the presence of pneumoconiosis since in his opinion if the fibrosis were in deed related to a diffuse disease, that disease would have been present at autopsy.

In his review of the autopsy report, Dr. Goldstein felt that it confirmed his own opinion that the miner did not have pneumoconiosis. While the report mentions "anthracosis," Dr. Goldstein stated that this term simply means dust of the lung, but is non-specific as to the type of dust. Furthermore, the report made no finding of coal macules and cited the degree of anthracosis as at least moderate but not greater than that commonly seen. Finally, Dr. Goldstein believed that the report's finding of severe emphysema in all lung lobes as evidenced by abnormally large air spaces, was consistent with his own diagnosis of chronic obstructive pulmonary disease.

This concludes a review of the medical evidence in the record.

Part 718 Analysis

Benefits are payable on a survivors' claim filed on or after January 1, 1982, only where the miner's death was due to pneumoconiosis. It is sufficient if the pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or if the death was caused by complications of pneumoconiosis or if the x-ray evidence establishes that the miner suffered from complicated pneumoconiosis. 20 C.R.F. §205(c)(1), (2) and (3). However, where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, the survivor is not eligible for benefits unless the evidence establishes the pneumocnoiosis was a substantially contributing cause of death. 20 C.F.R. §718.205(c)(4).

A preliminary determination must be made as to whether the miner did in fact have pneumoconiosis. The record contains three x-rays, dating from September 27, 1976 through June 6, 1980, which were read a total of fourteen times. The earliest x-ray, dated September 27, 1976, was read as negative by Drs. Goldstein, Hayes, and Cole, the last two of whom were "B" readers and again by

Dr. Goldstein after he qualified as a "B" reader. As only Dr. Stitik, whose qualifications are not listed, interpreted the x-ray as positive, I find that this x-ray is negative for pneumoconiosis. The second x-ray, dated May 22, 1979, was read as negative by Drs. Goldstein and Hays, a "B" reader, and by Dr. Goldstein again after he qualified as a "B" reader. While Dr. Walker, also a "B" reader, interpreted it as positive, I find that the weight of the readings is negative for this x-ray as well. However, the last x-ray, dated June 6, 1980, was read as positive by Dr. Hays, a "B" reader, and by Dr. Goldstein, both before and after he qualified as a "B" reader, but as negative by Drs. Russakoff, Ballard and Walker, all of whom were "B" readers, and, therefore this x-ray must be considered as positive. Since pneumoconiosis is a progressive disease and the latest x-ray is the most probative, I find that x-ray evidence when considered alone supports a finding of pneumoconiosis.

However, the record also contains other evidence which is more probative of the existence of pneumoconiosis. The biopsy report of June 23, 1981, noted extensive histiocytosis and anthracotic pigmentation in the parahilar area, fibrosis with anthracotic pigmentation in the right upper lobe and pulmonary interstitial fibrosis with multiple pigmented macrophages in the right lower lobe. Dr. Goldstein, a well-qualified pulmonologist, reviewed this report as an expert witness and determined that it did not support a finding of pneumoconiosis. He stated that "anthracotic pigmentation" only refers to dust in general and not to a specific type of dust such as coal dust, further noting that anyone could get anthracotic pigmentation just from breathing the air. He also stated that the term "fibrosis" was non-specific and in this case could simply mean fibrosis associated with and adjacent to the patient's lung tumor. Dr. Goldstein believed that if the fibrosis were in deed related to a diffuse disease, the

disease would have been present at autopsy. Finally, Dr. Goldstein explained that the "multiple pigmented macrophages" listed as present in the report were simply cells normally found in the lungs which functioned to pick up dust particles. I therefore find that pneumoconiosis has not been established by the biopsy report. *See Winston v. Director, OWCP,* 2 BLR 1-187 (1979) (wherein the Board held that biopsy and lobectomy findings of anthracotic pigmentation were not indicative of pneumoconiosis in a Part 727 analysis). Instead, on the basis of the several procedures performed at the time of the biopsy, a post-operative diagnosis of pulmonary carcinoma of the right lower and upper lobes was made.

The record also contains an autopsy report, dated September 29, 1982, which listed among its findings severe emphysema in both lungs, residual bronchogenic carcinoma in the lower right lobe, purulent bronchitis, and moderate anthracosis, but no nodular fibrosis to suggest silicosis. Dr. Goldstein, who reviewed this report as well, explained that the term "anthracosis" simply means dust of the lungs and is not specific to coal dust. He further noted that the report specifically found an absence of silicosis and had no finding of coal macules which would be seen if pneumoconiosis was present. Finally, Dr. Goldstein opined that since the anthracosis was described in the report as moderate, but "not greater than that seen commonly," it could not support a finding of pneumoconiosis. I accept Dr. Goldstein's analysis and find that pneumoconiosis has not been established by autopsy. Furthermore, since autopsy evidence is the most reliable and as neither the autopsy nor biopsy reports support the marginally positive x-ray findings, I must conclude that the presence of clinical pneumoconiosis has not been established.

The pulmonary function tests and arterial blood gas studies in the record are only relevant to the extent that

individual physicians relied upon them in making a diagnosis of pneumoconiosis, and not for what they reveal about the degree of the miner's disability which is not at issue herein.

Only one physician, Dr. Russakoff, diagnosed pneumoconiosis. Dr. Russakoff, who relied upon the patient's employment and smoking histories, physical exam, chest x-ray, pulmonary function tests and arterial blood gas studies in reaching his conclusions further diagnosed chronic obstructive pulmonary disease of mild to moderate degree, significant pulmonary dysfunction as evidenced by hypoxia on arterial blood gas testing, and unrecurring stomach lymphoma. He further opined that the obstructive changes noted on x-ray were also consistent with the miner's extensive smoking history. However, the other examining physician, Dr. Goldstein, disagreed that the miner had an occupationally-related dust disease and found on the basis of employment and smoking histories, physical exam, chest x-ray, pulmonary function tests and blood-gas studies that he was suffering from chronic obstructive pulmonary disease, secondary to cigarette smoking. Furthermore, Dr. Goldstein did not believe that the diagnosed condition was related to or aggravated or caused by coal dust exposure. Because Dr. Goldstein had access to the later biopsy and autopsy reports and could find nothing in them to contradict his original findings or to indicate the presence of pneumoconiosis, I find that his diagnosis is entitled to the greatest weight and must conclude that on the basis of the medical reports a pulmonary or respiratory disease arising out of coal mine employment has not been established.

The final report to be considered is the death certificate which listed cardiopulmonary arrest arising from bronchoalucolar carcinoma as the immediate cause of death and noted gastric lymphoma as another significant

condition. There is no mention of pneumoconiosis. It must therefore be concluded that the miner's death was not due to pneumoconiosis as that phrase is defined in the regulations.

In summary, the claimant has not established the existence of pneumoconiosis or that death was due to pneumoconiosis and therefore, Mitchell and Neely are not liable for benefits to the widow.

Section 725.212 Automatic Entitlement

This decision in no way effects the widow's right to benefits under section 725.212 allowing the survivor automatic entitlement without a showing of death due to pneumoconiosis where the miner has been awarded benefits on a claim filed prior to January 1, 1982. As previously discussed, because such liability is contingent upon previous determinations of eligibility on the miner's claim made during proceedings in which Mitchell and Neely was not a party, the employer cannot be liable under this section. Therefore, liability for continuing payments to the widow must fall to the trust fund which is also responsible for payments on the miner's claim.

ORDER

It is hereby ORDERED that:

1. The trust fund pay to the estate of James W. Gamble, all benefits to which he was entitled to and is still owed under the Act, commencing June 6, 1980, and continuing until his death on September 28, 1982, as augmented by his surviving widow, Mary Gamble;

2. The trust fund pay to the estate of James W. Gamble all medical and hospitalization benefits to which he was entitled to and still owed under the Act; and

3. The trust fund pay to the claimant, Mary Gamble, all survivor's benefits to which she is entitled to under the Act, commencing in September 1982.

/s/ A. A. Simpson, Jr.

A. A. SIMPSON, JR.
Administrative Law Judge

Dated: APR 05, 1989
Metairie, Louisiana

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Decision and Order On Remand may appeal it to the Benefits Review Board within 30 days from the date of this decision by filing a notice of appeal with the Benefits Review Board, Suite 757, 1111 20th Street, N.W., Washington, D.C. 20036

SERVICE SHEET

Case Name: JAMES GAMBLE (DECEASED), MARY GAMBLE (WIDOW)

Case No.: 88-BLA-2308

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APR 05, 1989